**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 3 OF 2019**

**GERALD WANJOHI WACHIRA.....APPLICANT/APPELLANT**

**VERSUS**

**BIASHARA SACCO LIMITED.....1ST RESPONDENT**

**PROVIDENCE AUCTIONEER.....2ND RESPONDENT**

**(Being an appeal from the ruling of Honourable C. K. Kithinji, Deputy Chair, P. Swanya-Member, R. Mwambura-Member**

**in the Nairobi Co-operative Tribunal Case No. 442 of 2018 delivered on 11th December 2018).**

**RULING**

**Introduction**

1. This application dated 15th March 2019 brought under **Order 40 Rule 1, 2, 3, Order 42 Rule 6(1) & (4), Order 50 Rule 6 and Order 51 of the Civil Procedure Rules and Section 1A, 3A and 63(e) of the Civil Procedure Act** seeks for orders for stay of execution of the judgement delivered on 11/12/2018 and all the consequent orders arising from the intended sale of the applicant's properties Land Parcel No.s EUSONYIRO/SUGUROI 4375, 4503 & 4502 (the suit properties) by public auction slated for 18th March 2019 pending the hearing and determination of this appeal. The applicant also seeks to have this honourable court declare as null and void abnitio the advertisement of sale of the suit properties.

2. In opposition of the said application, the respondents filed grounds of opposition dated 18th March 2019 and a Replying Affidavit dated 25th March 2019.

3. Furthermore, the applicant filed a Supplementary Affidavit dated 25th March 2019 and filed in court on 1st April 2019.

**The Applicant's Case**

4. It is the applicant's case that the ruling was delivered on 11/12/2018 and a temporary injunction was issued against the sale of the suit properties unless a valuation was done and a notification of sale issued. The applicant, aggrieved by that decision, lodged an appeal against the ruling.

5. The applicant is apprehensive as the respondents have commenced execution as the respondents scheduled a sale by public auction on 18h March 2019. The applicant adds that the intended sale is in contravention of the orders of the court issued on 11/12/2018 as the respondents have not served the applicant with any notification of sale.

6. The applicant contends that his appeal has a high chance of success as it raises meritious and weighty issues for determination by the court and thus it is in the interest of justice that stay of execution be granted to ensure a fair trial. The applicant further contends that he stands to suffer irreparable loss and harm if the orders sought are not granted as he stands to lose his properties which infringes on his right to property.

7. The applicant states that if the application herein is not allowed, it will render the appeal nugatory.

**The Respondents' Case**

8. It is the respondents' case that the application herein is fatally and incurably defective, misconceived, scandalous, frivolous, vexatious,

and otherwise an abuse of the court process.

9. The respondents contend that the applicant is in the habit of stalling the sale by public auction by filing in court applications at the last minute. The applicant filed an application for an injunction on 4th July 2018 yet the sale was scheduled for the next day, 5th July 2018 which sale was stopped by the court. The applicant filed a further application dated 17th September 2018 which was struck out as incompetent. The applicant then rushed to the tribunal at Nairobi and in Tribunal Case No. 442 of 2018 sought orders which were granted on condition that a fresh valuation be done. The respondents add that they did a fresh valuation with the participation of the applicant and he waited till almost the sale of 18th March 2019 to bring the instant application. As such, the conduct of the applicant is full of malafides.

10. The respondents aver that they have expended money during all those occasions in terms of advertisement fees and payment to auctioneers. Further, the numerous applications by the applicant are prejudicial to the respondents' rights under the charge.

11. The respondents further state that by the tribunal attaching a condition on the order they made on 11th December 2018, the same can be interpreted as a dismissal order of the application. As such, one cannot stay a dismissal order.

12. The respondents contend that the instant application is scanty and vague as the applicant has failed to attach the ruling of the tribunal. The respondents further add that in the interests of justice, the application herein ought to be dismissed with costs.

13. The applicant filed a Supplementary Affidavit dated 25th March 2019 in which he states that there no proceedings, order or decree annexed in respect to Nyeri Civil Suit No. 192 of 2018 to prove the basis of the alleged Notice to Show Cause and why it was struck out as incompetent. Further, the applicant states that the matter was brought to this court because the trial court lacked jurisdiction to hear the dispute which was precipitated by the respondents' preliminary objection dated 10th July 2018.

14. The applicant further contends that he did not participate in any valuation. He adds that he has a competent appeal challenging the orders issued which are positive orders and cannot be interpreted as orders of dismissal.

15. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

**The Applicant's Submissions**

16. According to the applicant, an order of stay is necessary to preserve the subject matter in order to prevent the appeal from been rendered nugatory. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules a**nd the case of **Amal Hauliers Limited vs Abdulnasir Adukar Hassan [2017] eKLR** in which the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** was cited with approval, and submits that he has met the threshold in granting of stay. He submits that his appeal raises a *prima facie* arguable case as he has shown that the respondents did not follow the realization process provided in the law. He adds that he has demonstrated his willingness to furnish security or abide by any conditions set out by the honourable court. The appellant submits that he filed the instant application timeously.

17. The applicant reiterates that he was not served with any notification of sale nor did he participate in any valuation process. He further adds that the orders made by the tribunal dated 11th December 2018 are positive orders and not negative as alleged by the respondents. He relies on the cases of **Joseph Muthuri & 35 Others vs Cooperative Bank Limited & 15 Others [2018] eKLR** where the court relied on the case of **Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah [2008] eKLR ; Raymond M. Omboga vs Austine Pyan Maranga Kisii HCCA No. 15 of 2010 and Catherine Njeri Maranga vs Serah Chege & Another (2017) eKLR** where the court cited the case of **Co-op Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR** and submits that the ruling of 11th December 2018, the subject of the instant appeal, ordered the respondents to sell the suit properties upon conducting a valuation of the said properties and issuing a notification of sale thus consisted of positive orders capable of been stayed.

18. The applicant submits that he has met the conditions set out to warrant stay of execution pending appeal and thus prays the application be allowed.

**The Respondents' Submissions**

19. The respondents submit that the applicant is notorious for seeking injunctive orders just before a public auction is scheduled by the respondents with an aim to defeat the 1st respondent's rights under the charge. The respondent adds that since the applicant sought discretionary orders from the tribunal. He ought to show on appeal that the tribunal did not exercise its discretion judiciously and/or took into consideration extraneous matters before it. Further, the applicant has not annexed a detailed ruling of the tribunal to enable this honourable court decide whether the tribunal acted within the law. The respondents rely on the case of **Mbogo & Another vs Shah (1968) EA 93** to support their contention that the applicant has not shown how the tribunal exercised its discretion wrongfully.

20. The respondents further submit that since the orders rendered by the tribunal are negative in nature, there is nothing to stay. The respondents were allowed to proceed with the sale once they did a valuation and yet the applicant has not alleged that no valuation was carried out.

21. The respondents contend that the application is frivolous, mis-conceived, bad in law and a gross abuse of the court process as the applicant ought to be seeking an injunction from the court and not stay under Order 42 Rule 6. Further, the respondents contend that the applicant has filed numerous suits on the same issue which does not assist the court in reaching a just, expeditious and proportionate resolution of the dispute herein. The respondents rely on the case of **Caneland Limited vs African Banking Corporation Limited Civil Application No. 24 of 2017** to support their submissions. As such, the respondents pray that the instant application is dismissed with costs.

**Issues for determination**

22. After careful analysis, the main issue for determination is:

a) Whether the applicant has met the perquisite for grant of stay of execution pending appeal.

**The Law**

**Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal;**

23. The principles upon which the court may stay the execution of orders appealed from are well settled. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

> **1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.**
>
> **2. No order for stay of execution shall be made under sub rule 1 unless:-**
>
> **a) The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and**
>
> **b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.**

*24. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:*

> *1. Substantial loss may result to him unless the order is made;*
>
> *2. That the application has been made without unreasonable delay; and*
>
> *3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.*

25. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

> **1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
>
> **2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.**
>
> **3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
>
> ***4.* Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.**

***Substantial loss***

26. *Under this head, an Applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of* ***Shell* Ltd vs Kibiru and Another [1986] KLR 410 Platt JA** set out two different circumstances when substantial loss could arise as follows:-

> **"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages….It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."**

The learned judge continued to observe that:-

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.**

Earlier on, Hancox JA in his ruling observed that:-

> **"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would…render the appeal nugatory.**
>
> **This is shown by the following passage of Cotton LJ in Wilson vs Church (No.2) (1879) 12 ChD 454 at page 458 where he said:-**
>
> **"I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see the appeal, if successful, is not rendered nugatory. "**
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."**

27. On keenly perusing the applicant's application, it is clear he simply states in his affidavit that substantial loss will occur as his properties will be sold which will serve as an infringement of his right to property. He adds that substantial loss will occur because the intended sale will be carried out without the respondents following the law thus rendering the sale a nullity. Evidently, the applicant had charged his properties to the 1st respondent and when the said properties were charged, they became a commodity for sale. It is also evident that the applicant defaulted in payment of the said loan and the 1st respondent has made attempts to exercise its statutory power of sale. The applicant has not shown what substantial loss he will suffer if stay is not issued. I am persuaded by the case of **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) KLR 63**, where the court held that:-

> **"In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars…..where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay…"**

28. The respondent may sell the security any time and is yet to comply with the law on the valuation report as directed earlier. In this regard I am convinced that if the security is sold at this stage, the applicant is likely to suffer substantial loss. I am therefore satisfied that substantial loss has been established to the extent that the respondent has not complied with the law.

**The application has been made without unreasonable delay.**

29. The ruling was rendered by the tribunal on 11th December 2018, the Memorandum of Appeal was filed on 11th January 2019 and the instant application was filed on 15th March 2019. The application herein has been filed two months past the statutory time allowed. The applicant contends that there is no inordinate delay in bringing the instant application. He further adds that though the two months have lapsed he lodged his appeal within the time provided and thus the duration of two months could not be said to amount to inordinate delay. He adds that the court ought to take into consideration that the intended sale was in breach of the law as the 1st respondent had not adhered to section 97 of the Lands Act. Based on the reasoning of the applicant, I am of the view that he does not give a satisfactory reason for the delay of two months. However, in the interests of justice I find that the period of two months is not unreasonable delay.

**Security of costs.**

30. The applicant ought to satisfy the condition of security. In saying so, I rely on the following persuasive authorities. In the case **of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR** the court observed:-

> **"The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.**
>
> **Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favor. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal….**
>
> **Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In**

**any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."**

31. Similarly in **Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

**"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor…..Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."**

32. While in **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR** it was stated that:-

**"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay."**

33. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.

34. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In saying so I rely on the case **of Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR** where the Court upheld the decision of **Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991** and stated that:

**"That right of appeal must be balanced against an equally weighty rigid right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."**

35. In the present application, the applicant has stated that he is willing to abide by any conditions given by the court.

36. Further on the issue of balancing the rights between the applicant and respondent, the ruling of the tribunal was clear that the respondents were at liberty to sell upon conducting a valuation and serving the applicant with a notification of sale. The respondents have not produced in this court any valuation report or a copy of the notification of sale served upon the applicant. It is only contended in their affidavit that they carried out a valuation process in which the applicant participated in. It was important that such valuation report be annexed herein.

37. Thus in the interests of justice, I find that the balance tilts in favour of the applicant as the 1st respondent has not shown that it complied with the orders previously granted.

**38.** From the foregoing reasons, I am of the view that the application for stay partly succeeds on the premise that the respondents are at liberty to sell the suit properties in the event they carry out a valuation and thereafter issue to the applicant a notification of sale in accordance with the law.

39. This being an application for stay, I decline to issue orders sought in prayer 4 of the application.

**Conclusion**

40. From the foregoing reasons, I am of the considered opinion that the application dated 15th March 2019 partly succeeds and is allowed on the following terms:-

a) That the orders for stay are hereby issued to the extent that the respondent has not complied with the law as to the valuation of the security.

b) That each party meets its own costs of this application

41. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 22ND DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 22nd day of July, 2021.**